

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

DEV/MAR CORPORATION,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 87-163

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a notice and order of civil penalty (No. 6687), assessing \$1000 for alleged violations of Article 6 of Regulation I of the Puget Sound Air Pollution Control Agency (PSAPCA), came on for hearing on March 31, 1989, in Everett, Washington, before the Pollution Control Hearings Board; Wick Dufford, presiding, and Harold S. Zimmerman.

Robert Jungaro, owner, represented Dev/Mar. Keith D. McGoffin, attorney at law, represented PSAPCA. The proceedings were reported by Pamela Moughton of Bartholomew & Associates. Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following:

FINDINGS OF FACT

I

Dev/Mar is a construction and development company located in Mukilteo, Washington.

II

PSAPCA is a municipal corporation with authority to conduct a program of air pollution prevention and control in a multi-county area which includes the City of Everett, site of the burning in question.

The Board takes notice of PSAPCA's Regulation I, including Article 8, which deals with causing or allowing outdoor fires.

III

On January 16, 1987, PSPACA issued a Population Density Verification for land clearing burning to Dev/Mar, confirming that the population within 0.6 miles of the proposed burning site (8605 18th Avenue West, Everett, Washington) is 2500 persons per square mile or less. At the time, Article 8 allowed land clearing burning to be conducted in such relatively sparsely populated areas. Former Section 8.06.

"Land clearing burning" was defined in Section 1.07(y) as follows:

Land clearing burning" means outdoor fires consisting of residue of a natural character such as trees, stumps, shrubbery or other natural vegetation arising from land clearing projects and burned on the lands on which the material originated.

The Population Density Verification contained the following written warning:

The outdoor fires must not contain any material other than trees, stumps, shrubbery or other natural vegetation which grew on the property being cleared.

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IV

On January 29, 1987, the City of Everett Fire Department issued a permit to Robert Jungaro, owner, for Dev/Mar to conduct "controlled outdoor burning for the purpose of land clearing" at 8605 18th Avenue West, Everett, Washington.

Attached to the permit was a notice which advised that the site had been inspected and a large pile of debris and refuse had been observed, including boards, shingles, composition roofing materials, plastic tarps, pails, metal objects, discarded plastic toys and discarded tires.

The notice stated that none of these items were to be burned and that the permit was only for burning natural vegetation which grew on the property to be cleared.

V

On March 12, 1987, in the early evening, fire inspector Warren Burns arrived at 8605 18th Avenue West to inspect a fire being burned under the Everett Fire Department's permit. He found the fire burning unattended, without a fire watch, containing (in addition to natural vegetation) a rubber tire, concrete blocks, plastic buckets, pieces of sheet metal.

About 30 minutes after the inspector arrived, Robert Becker, Dev/Mar's subcontractor for clearing and burning, appeared and commenced to extinguish the fire with a bulldozer at the fire inspector's request.

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VI

The Everett Fire Department advised PSAPCA of its inspection and observations. On March 20, 1987, PSAPCA issued two notices of violation jointly to Dev/Mar and to Robert Becker for burning on March 12, 1987. Notice No. 021909 asserted a violation of Regulation I, Section 8.05(1) and described the violation as "an outdoor fire other than land clearing or residential burning without prior written approval" of PSAPCA. Notice No. 021910 asserted a violation of Regulation I, Section 8.02(3) and described the violation as "an outdoor fire containing prohibited materials such as tires and plastic."

Subsequently, on May 29, 1987, PSAPCA issued to Dev/Mar and to Becker a Notice and Order of Civil Penalty (No. 6687) which assessed an aggregate fine of \$1000 for the two violations asserted in the notices of violation referring to March 12, 1987.

On June 2, 1987, Robert Jungaro, for Dev/Mar, filed with this Board a notice of appeal, relating explicitly to Notices of Violation Nos. 021909 and 021910. We find that it was his intention, by this action, to appeal the civil penalty relating to these violation notices.

VII --

PSAPCA issued to Dev/Mar another notice of violation and another civil penalty notice for \$1000 asserting the burning of prohibited

1 material at the same site on April 15, 1987. The Board's files
2 disclose no record of any notice of appeal referring to these
3 documents and this incident.

4 VIII

5 Prior to the Dev/Mar project, a considerable amount of
6 non-vegetative debris and garbage had been dumped on the burning site
7 by members of the public. On March 10 and 11, 1987, Jungaro had over
8 100 cubic yards of this material hauled away to an authorized
9 disposal site.

10 There is no evidence that Jungaro or Becker themselves brought
11 any material in from off-site to be burned.

12 IX

13 The burning had been in progress for at least three days before
14 the inspection on March 12th, during which time a fire watch had been
15 on hand. There is no evidence that this watchman observed any debris
16 being brought into the site and placed in the fire by strangers.

17 The fire watch was absent briefly on the 12th and was not
18 present when Inspector Burns arrived. We are not convinced, however,
19 that the non-vegetative debris found in the fire by the inspector was
20 imported by strangers and placed in the fire during this short hiatus.

22 X

23 PSAPCA attempted to introduce into evidence the affidavit of its
24 own inspector, dealing with a follow-up visit to the site after the
25

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1 report of Inspector Burns inspection was received. The PSAPCA
2 inspector was not present at hearing, having moved to California.

3 Upon objection, his affidavit was excluded. The Board's
4 Findings concerning the March 12, 1987 fire and the condition of the
5 site are derived solely from the testimony of the Everett Fire
6 Department's Inspector Burns.

7
8 XI

9 PSAPCA's enforcement chief testified as to prior proceedings
10 involving Mr. Jungaro.

11 Jungaro was held to have violated land clearing burning
12 requirements and to have burn prohibited material in a prior incident
13 occurring some 10 years earlier. Jungaro v. PSAPCA, PCHB No. 77-168
14 (1978). In the present case, his actions in obtaining permits and in
15 having non-vegetative debris hauled away from the site evidence a
16 knowledge of the applicable regulations restricting burning.

17
18 XII

19 We find Becker acted as Dev/Mar's agent. We find that Dev/Mar
20 caused or allowed the outdoor fire containing the materials observed
21 by Inspector Burns on March 12, 1987.

22 XIII

23 We find that the fire consisted primarily of natural residue
24 from land clearing of the site. Although some attempt was made to
25

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1 rid the site of other debris, the effort was incomplete, and a
2 certain amount of pre-existing non-vegetative debris was also
3 burned. However, we are persuaded that the burning of such debris
4 was incidental to the principal aim of the burning which was to
5 dispose of land clearing wastes generated on site.

6
7 XIV

8 Any Conclusion of Law which is deemed a Finding of Fact is
9 hereby adopted as such.

10 From these Findings of Fact, the Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 The Board has jurisdiction over these persons and these
14 matters. Chapters 43.21B and 70.94 RCW.

15
16 II

17 This case has a rather lengthy procedural history of
18 postponements and rescheduling. The Board was obliged to reschedule
19 the matter after the initial hearing date, December 14, 1987. Then,
20 though all parties were present and ready to proceed, other matters
21 took the available hearing time. After several reschedulings, the
22 matter was set for September 13, 1988. On that date, Dev/Mar failed
23 to appear and an Order of Dismissal was entered. Subsequently
24 Jungaro asked that the matter be re-opened on the grounds he had
25

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1 received no notice of the September 13 hearing. Thereafter, an Order
2 Granting Motion to Reconsider was entered (November 2, 1988), the
3 Order of Dismissal was, in effect, vacated and the matter was
4 rescheduled for hearing. Following one more continuance, the hearing
5 was actually conducted on March 31, 1989.

6 The absence of PSAPCA's own inspector at hearing doubtless owes
7 something to the extraordinary delay. Nonetheless, his affidavit was
8 excluded on the grounds of its hearsay nature and the inability of
9 appellant to cross examine. That ruling is hereby affirmed.

11 III

12 RCW 70.94.740 states, in pertinent part:

13 It is the policy of the state to achieve and
14 maintain high levels of air quality and to this
15 end to minimize to the greatest extent reasonably
16 possible the burning of outdoor fires.
17 Consistent with this policy, the legislature
18 declares that such fires should be allowed only
19 on a limited basis under strict regulation and
20 close control.

21 RCW 70.94.775 states in pertinent part:

22 No person shall cause or allow any outdoor fire:

23 (1) containing garbage, dead animals,
24 asphalt, petroleum products, paints, rubber
25 products, plastics, or any substance other
26 than natural vegetation which emits dense
27 smoke or obnoxious odors...

IV

At the time of the event in question, Section 8.02 of
PSAPCA Regulation I, stated in pertinent part:

It shall be unlawful for any person to cause
or allow any outdoor fire: . . .

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1 (3) containing garbage, dead animals,
2 asphalt, petroleum products, paints, rubber
3 products, plastics, or any substance other than
4 natural vegetation which emits dense smoke or
5 obnoxious odors

6 Section 8.05 of Regulation I stated in pertinent part:

7 It shall be unlawful for any person to cause
8 or allow any outdoor fire other than land clearing
9 burning or residential burning except under the
10 following conditions:

11 (1) Prior written approval has been issued
12 by the Control Officer or Board ...

13 Appellant's burning is alleged to have violated both of these
14 regulatory sections.

15 V

16 We conclude that the fire burned on May 12, 1987, violated
17 Regulation I, Section 8.02(3)(and RCW 70.94.775) because it contained
18 prohibited materials. We further conclude that Dev/Mar is legally
19 responsible.

20 VI

21 However, we conclude that no independent violation of Section
22 8.05(1) was shown.

23 VII

24 Section 8.05(1) refers to burning which is neither land clearing
25 burning nor residential burning. Residential burning is not involved
26 here. So, the apparent basis for alleging this violation is the
27 theory that any fire which contains material other than natural
vegetation generated on site is outside the definition of land

1 clearing burning. Section 1.07(y)(quoted in Finding III above).

2 We do not agree that the mere presence of prohibited materials
3 in what is primarily a land clearing fire gives rise to a separate
4 offense for failure to get a non-land-clearing burn permit. Such a
5 permit, if sought, would be unobtainable because burning prohibited
6 material cannot be allowed.

7 Thus, the permit requirement in this context is just another way
8 of saying, "Thou shalt not burn prohibited materials." Appellant is
9 being charged with two violations for the same thing.

10 The State Clean Air Act states that each violation is "a
11 separate and distinct offense." RCW 70.94.431. Implicit in this
12 formulation is, we believe, the intention that each separate and
13 distinct violation requires different acts or consequences on the
14 part of the violator. See Sher-Wood Products, Inc. v. PSAPCA, PCHB
15 No. 85-13 (1985).

16 If appellant had hauled material in from another site to burn,
17 the definition of land clearing burning would have been violated and
18 a permit would have been required. Such action would constitute a
19 separate substantive offense. See Lloyd Enterprises v. PSAPCA, PCHB
20 85-155 (1985).

21 Moreover, if the burning in question were shown to involve
22 non-vegetative materials to such an extent that the burning of these
23 materials could be said to be more than incidental to what is
24 primarily a land clearing fire, then a separate and distinct
25

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1 violation would be made out. But, the record does not so persuade us
2 in this case.

3 VII

4 The \$1000 penalty in this case is based on two asserted
5 violations. Having concluded that only one of these violations
6 should be sustained, we turn to whether the amount of penalty is
7 appropriate.

8 Analysis of this issue involves a consideration of factors
9 bearing on reasonableness, including:

10 (a) the nature of the violation;

11 (b) the prior behavior of the violator;

12 (c) actions taken after the violation to solve the problem.

13 Puget Chemco, Inc. v. PSAPCA, PCHB No. 84-245 (1985).

14 On the record before us, the violation appears to have been the
15 result of a lack of thoroughness in segregating materials from the
16 burn piles in circumstances where the violator knew or should have
17 known what could and couldn't be burned. However, serious air
18 pollution consequences were not shown.

19 Jungaro personally (not Dev/Mar) was shown to have violated land
20 clearing burning and prohibited materials regulations 10 years
21 earlier, but that event, remote in time, does not constitute a prior
22 pattern of corporate violations.

23 A notice of violation and penalty were issued to Dev/Mar for
24 burning prohibited materials a month later at the same site.

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1 However, under the circumstances, we are unwilling to accept these
2 bare citations as proving the facts they assert, and have not
3 considered them as establishing appellant's post-offense behavior.
4 We do note, however, that Dev/Mar's employees readily complied with
5 the instructions given at the site by Inspector Burns.

6 VIII

7 Dev/Mar argues that its appeal includes the notice of violation
8 and civil penalty relating to April 15, 1987. As noted in our
9 Finding VII, we disagree. The appellants pleadings make no reference
10 to either of these documents.

11 Accordingly, we hold that no appeal of the asserted violation
12 and penalty relating to April 15, 1987, is or has been before us.
13 RCW 43.21B.300(2) provides a 30 day appeal period after a civil
14 penalty is received by the person penalized. The time to appeal
15 these later citations had long since passed by the time this matter
16 came to hearing.

17 IX

18 Under all the facts and circumstances, we believe that the
19 maximum allowable penalty is unwarranted for the single violation of
20 burning prohibited materials on the date in question (March 12,
21 1987). The following Order is, we decide, appropriate. .

22 X

23 Any Finding of Fact which is deemed a Conclusion of Law is
24 hereby adopted as such.

25
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ORDER

The violation of Section 8.05(1) of Regulation I is reversed.
The violation of Section 8.02(3) of Regulation I is affirmed.
The penalty is abated to \$500 and affirmed in that amount.

DONE this 14th day of Sept, 1989.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFOURD, Presiding



HAROLD S. ZIMMERMAN, Member

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